

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 The Estate of Ricardo-Puentes, et. al.

4 Plaintiffs

5 v.

CIVIL NO. 07-1751 (GAG)

6 Municipal Government of Isabela,
 Puerto Rico

7 Defendant

8 **MEMORANDUM OPINION AND ORDER**

9 This case involves the unfortunate drowning of a mother and her son at Jobos Beach in
10 Isabela, Puerto Rico. Plaintiffs, the decedents' estate and surviving family members, bring this
11 damages action against the Municipality of Isabela and its Mayor, alleging negligence under Article
12 1802 of the Puerto Rico Civil Code, P.R. Laws Ann. tit. 31, § 5141, and a civil rights claim under
13 28 U.S.C. § 1983. This Court's jurisdiction is purportedly premised on the federal claim, as well
14 as supplemental jurisdiction to entertain the local law claim.

15 The Municipality of Isabela has moved to dismiss (Docket No. 43) the case on the ground
16 that it does not control nor maintain the particular beach in question. Plaintiffs filed an opposition
17 (Docket No. 50) wherein they contend that their federal constitutional claims are based on Section
18 1983, and that indeed, defendants failed to protect the decedents' federal rights.

19 A review of the Amended Complaint (Docket No. 39) reveals that plaintiffs have failed to
20 plead a federal constitutional claim under Section 1983. Consequently, the entire complaint must
21 be dismissed as there is no jurisdiction to entertain the state tort claim.

22 For purposes of its analysis under Fed. R. Civ. P.12 (b)(6), the Court has taken all the
23 plaintiffs' factual allegations as true and indulged all reasonable inferences therefrom. Ramos-
24 Piñero v. Puerto Rico, 453 F.3d 48, 51 (1st Cir. 2006).

25 Here, the deceased were bathing in shallow water at Jobos Beach on March 22, 2005. A
26 strong underwater current known as "El Chorro" (the spurt) dragged them, sucking them underwater,
27 where they drowned, despite all rescue efforts. Amended Complaint (Docket No. 39) at ¶¶ 15, 27,
28 28, 30, 32.

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1 Plaintiffs contend that defendants, with deliberate indifference, failed to develop and
2 implement policies, practices and procedures to ensure the safety of citizens at Jobos Beach. Id. at
3 ¶¶ 54, 64. They point to a report by the United States Lifesaving Association which notes an
4 unacceptable drowning rate at Jobos Beach. Id. at ¶ 57. The same recommends that lifeguards be
5 present and encourage people to swim in protected areas. Id. at 58. They further point to a 1997
6 study prepared by the National Resources Council which concludes that “the territory of Puerto Rico
7 has a water quality monitoring program that seems not to be designed for the safety of bathers or
8 marine recreation.” Id. at ¶ 63.¹

9 Plaintiffs’ constitutional claim is one of substantive due process due to defendants’ failure
10 to provide adequate safety at Jobos Beach. The Court’s analysis thus focuses on whether the
11 defendants’ behavior “is so egregious, so outrageous, that it may fairly be said to shock the
12 contemporary conscience.” County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998); see also
13 Ramos-Piñero, 453 F.3d at 53 (applying Lewis “conscience-shocking” test). To meet this standard,
14 defendants’ behavior must intend to injure the plaintiffs. Lewis at 849; Ramos-Piñero at 53.

15 Nothing in the Amended Complaint indicates that defendants actually intended to harm the
16 deceased mother and son. More so, the particular danger at issue here — the underwater current —
17 was not a specific threat to the victim but to the general public who used the beach. See Ramos-
18 Piñero at 54 (noting conscience-shocking act must specifically place victim, and not public at large,
19 at risk).

20 The facts of this case are analogous to those in Ramos-Piñero, supra. There, a minor crossing
21 a flooded avenue fell in to an open manhole, where he was dragged, trapped and ultimately drowned.
22 Plaintiffs contended that because the governmental defendants knew of the existence of the open
23 manhole, yet failed to act, they committed a constitutional tort based on deliberate indifference. This
24 court dismissed the complaint and the First Circuit affirmed, noting that the “shock the conscience”
25 standard was not met. Id. at 55.

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28 ¹ Plaintiffs, in their first cause of action based on state law, further point to a myriad of
negligent acts by defendants. The Court will not discuss these as negligence does not give rise to
a constitutional civil rights claim. Daniels v. Williams, 474 U.S. 327, 332 (1986); Ramos-Piñero,
453 F.3d at 52-53.

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1 The case at bar presents an even more extreme argument to impose constitutional liability
2 upon municipal defendants. Unlike the open manhole, the danger at issue is one created by mother
3 nature. Hence, defendants cannot control the same. In Puerto Rico, there are several unfortunate
4 drownings every year, the most recent one this past weekend. This is certainly a horrific tragedy.
5 Notwithstanding and despite the Court's deep sympathy, the law has not federalized such incidents
6 to give rise to a constitutional cause of action for damages. Cf. Ross v. United States, 910 F.2d
7 1422, 1433 (7th Cir. 1990) (Due Process claim viable where deputy sheriff prevented rescuers from
8 saving drowning boy).

9 Accordingly, the instant complaint is dismissed with prejudice as to the Section 1983 cause
10 of action and without prejudice as to the Article 1802 cause of action. Plaintiffs are thus free to
11 pursue their Puerto Rico negligence law claim in the Commonwealth court system.

12 The Court's ruling applies to the other codefendants, the Mayor of Isabela and insurance
13 companies, given that they are in privity with the Municipality insofar as the Section 1983 analysis
14 is concerned.

15 **SO ORDERED.**

16 In San Juan, Puerto Rico this 29th day of May, 2008.

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18 */s/ Gustavo A. Gelpi*

19 GUSTAVO A. GELPI
20 United States District Judge
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